SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The American Propeller and Manufacturing Company, the petitioner herein, respectfully prays for a writ of certiorari to the Court of Claims of the United States to review a judgment in that Court, entered on October 5, 1936, and shows as follows:

A certified Transcript of Record in this case is filed herewith in accordance with Rule 41 of this Court.

I.

History of the Litigation.

On February 25, 1922, an original petition was filed by the petitioner (R. 1), and on May 7, 1935, an amended petition was filed (R. 1), alleging breach by the United States, the respondent herein, of five formal contracts entered into by it with the petitioner for the manufacture of propellers for airplanes during the emergency arising from the declaration by Congress, on April 6, 1917, that a state of war existed between the United States and the Imperial German Government.

These contracts were entered into on behalf of the respondent by officers who acted under the authority of the Secretary of War. Claims for breach by the respondent of each of these contracts were presented to the War Department during the month of September 1918, and, on or about November 22, 1918, a settlement agreement was made with the petitioner, on behalf of the respondent, by officers of the War Department, who also acted under the authority of the Secretary of War (R. 6-9). The settlement agreement, referred to as the Potter-Downey Agreement, as well as the original contracts, are all set forth in the petition and the amended petition. The settlement agreement was never performed by the respondent.

Petitioner's net claim, in the amount of $144,238.03 (R. 16), after giving respondent credit for walnut lumber furnished by it for use in the manufacture of propellers, was disputed in its entirety and testimony was offered pro and con the merits of this issue.

On May 13, 1935, the respondent filed a general traverse to the amended petition (R. 41).

On November 12, 1927, respondent filed an amended counterclaim to the original petition, including therein an in-

come and excess profits tax assessment for $191,413.04 against the petitioner for the year 1918, which assessment had been made on the 14th day of June, 1924 (R. 42).

Petitioner's replication to respondent's counterclaim (R. 43), having by leave of Court been filed on October 9, 1931, denied that any liability existed for the additional taxes sought to be imposed by said assessment, and testimony was offered pro and con this issue on the merits of the counterclaim.

The Court of Claims, on April 6, 1936, made special Findings of fact (R. 46-70), and conclusions of law (R. 70). In its opinion the Court of Claims, at page 77 of the record, said:

> "The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33 and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards 'just compensation', and under the general rules with reference to contracts no interest can be allowed."

Upon respondent's counterclaim the Court of Claims, at pages 81 to 83 of the record, held:

> "After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff should be computed on the basis of $103,071.67 as the invested capital, and $171,546.00 as

the net income. Making the calculation on this basis we find that the excess profits tax of plaintiff for 1918 is $100,916.17, and its income tax $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.

"The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest thereon. The statute provides for interest on the tax from the time it was assessed, and it may seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims, such a result would not follow; but, as was said in United States *v.* Verdier, 164 U. S., 213, 218:

"'* * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.'

* * * * * * *

"Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64, which, added to the amount of the underpayment of the tax, makes a total of $103,158.08 due defendant upon its counterclaim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96, for which judgment will be entered in its favor accordingly."

On June 2, 1936, the petitioner filed its motion for a modification *upon the question only* of the allowance of interest upon the counterclaim of the respondent (R. 43).

On June 5, 1936, the respondent filed its motion for a new trial and with it a motion for leave to file (which leave was granted), a memorandum re judgment, accompanied by a calculation of the tax, purporting to show that the Court had made a mistake in its own calculation.

On October 5, 1936, the Court handed down a memorandum opinion, holding in part as follows:

> "The plaintiff does not now ask that interest should be computed on the amount of its recovery, but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. *The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on the plaintiff's claim.* In this matter we are compelled to follow the law as we find it. The motion of the Plaintiff must be over-ruled" (R. 45). (Italics supplied.)

The Court, upon respondent's motion, sustained the respondent's calculation of the disputed tax and found the unpaid part thereof to be the sum of $82,701.29 (R. 45), instead of $60,373.44, as originally found, and found the interest thereon to be the sum of $58,607.64 (R. 45), thus making the Court's total allowance to the respondent upon the counterclaim $141,308.93 (R. 45). The Court then deducted from the last-mentioned sum $119,413.04 (R. 45), representing the allowance it had made to the petitioner upon its claim, and extended a judgment against the petitioner for the difference so ascertained, or the sum of $21,895.89.

II.

Points Arising Upon This Record.

Upon the record the following points are presented:

1. The Court of Claims erred in holding and determining that in a case like the present one, where the disputed indebtedness of the United States to the petitioner, in an amount now for the first time liquidated, although existing since the end of the year 1918, and being, as now liquidated, larger than the indebtedness of the petitioner to the United States, for taxes based on petitioner's income for the year 1918, now also for the first time, in the same action, liquidated, does not justify or require the merger of the smaller liquidated debt into the larger liquidated debt, and the extension of a judgment for the excess of the larger over the smaller.

2. The decision of this Court in *United States* v. *William J. Verdier*, 164 U. S. 213-220, has been misconstrued by the Court of Claims, and, when properly construed, does not support the Court of Claims' decision. The decision of the Court of Claims is also contrary to the principles of law upheld and applied by the Supreme Court in the case of *District of Columbia* v. *Johnson et al.*, 165 U. S. 330.

III.

Reasons Relied on for Allowance of the Writ.

Upon the questions presented by this record, certiorari should be allowed for the following reasons:

1. The decision of the Court of Claims, allowing interest from the year 1924 (the date of the erroneous assessment) upon that portion of the respondent's counterclaim which was in litigation and unliquidated until 1936, when it was

liquidated by the judgment of the Court of Claims, in view of the facts found in this case, to wit; that from and during the entire period of time since the end of the year 1918, the respondent, as found by the Court of Claims, was indebted to the petitioner in a sum greater by $36,711.75 than the sum for which, in the same action, the Court of Claims found the petitioner was indebted to the respondent, constitutes error and involves an important question of Federal law which has not been, but should be settled by this Court.

2. The Court of Claims, in holding that the decision of this Court, in *United States* v. *William J. Verdier*, 164 U. S. 213-220, requires the allowance of interest from 1924 (the date of the erroneous assessment) on that part of respondent's counter-claim which was not liquidated until October 5, 1936, by the judgment of the Court of Claims, in view of the facts found in this case, to wit; that from and during the entire period of time since the end of the year 1918, the respondent, as found by the Court of Claims, was indebted to the petitioner in a sum greater by $36,711.75 than the sum for which, in the same action, the Court of Claims found the petitioner was indebted to the respondent, has decided an important Federal question not authorized by this Court's decision in 164 U. S., 213-220, but in a way in conflict with the applicable decisions of this Court, and has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

No judgment or decree was ever obtained by the respondent for the additional income tax it claimed until when, on October 5, 1936, the correct amount of its counter-claim was determined by the Court of Claims in an amount less than one-half of the sum assessed in 1924. The assessment was grossly erroneous and had been disputed ever

since it was made. The petitioner was entitled to its "day in court," upon the merits of the asserted tax. It is true that it finally had it, and with the result that the assessed tax was reduced by the Court of Claims from $191,403.77 (R. 42) to $82,701.29)R. 45). But meanwhile, and during every day since the end of the year 1918, respondent, as found by the Court of Claims, was indebted to the petitioner in the amount of $119,413.04 (R. 77). This claim of the petitioner against the respondent, like the respondent's claim against the petitioner, had been disputed and both were in litigation. Both were litigated in the same action and their liquidation was accomplished through one and the same judgment in the Court of Claims, this being the judgment the review of which is here sought.

WHEREFORE your petitioner prays that a writ of certiorari issue, under the seal of this Court, directed to the United States Court of Claims, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Claims had in the case numbered and entitled on its docket "B-28, American Propeller & Manufacturing Company, a corporation, petitioner, *v.* The United States, respondent", to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Claims be reversed by the Court; and for such further relief as to this Court may seem proper.

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JOHN R. YATES,
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Dated at Baltimore, Maryland, December 23d, 1936.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims of the United States is reported in 15 Fed. Supp., at page 168, etc., and the Court's order of Oct. 5, 1936, modifying the judgment, will be found at page 44 of the record.

Jurisdiction.

The judgment of the Court of Claims of the United States, now sought to be reversed, was entered on October 5, 1936 (R. 83). The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, Chap. 229, 43 Stat. at L. 936.

The decision of this Court, which, it is believed, sustains said jurisdiction, is *Colgate* v. *United States*, 280 U. S. 43-49.

Statement.

This has already been stated in the petition, under "History of the Litigation" (Petition 2-5), which is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Claims erred in holding and determining that in a case like the present one, where the disputed indebtedness of the United States to the petitioner, in an amount now for the first time liquidated, although existing since the end of the year 1918, and being, as now liquidated, larger than the indebtedness of the petitioner to the United States, for taxes based on petitioner's income for the year 1918, now also for the first time liquidated in the same

action, does not justify or require the merger of the smaller liquidated debt into the larger liquidated debt, and the extension of a judgment for the excess of the larger over the smaller.

2. The decision of this Court, in *United States* v. *William J. Verdier*, 164 U. S. 213-220, has been misconstrued by the Court of Claims, and, when properly construed, does not support the Court of Claims' decision. The decision of the Court of Claims is also contrary to the principles of law upheld and applied by the Supreme Court in the case of *District of Columbia* v. *Johnson et al.*, 165 U. S. 330.

Argument.

The above specifications of errors will be argued together. We respectfully submit that the case of *United States* v. *Verdier*, 164 U. S. 213, which the Court of Claims treated as controlling, differs very materially from the case at bar. Two separate suits were there involved. James R. Verdier was a duly qualified postmaster of Beaufort, South Carolina, from July 1, 1866, to April 30, 1869. Upon his retirement from office he appeared as indebted to the United States, on the face of his postal accounts. On June 28, 1870, an action was brought by the United States against him on his official bond, in the United States District Court for the District of South Carolina, to recover his alleged indebtedness. There was a verdict against Verdier, which verdict was, upon motion of his attorney, set aside. The second trial resulted also in a verdict against him, and on January 25, 1871, judgment was entered thereon for $1,059.93. On November 3, 1885, application was made to the Postmaster General by Verdier's Administrator, for a re-adjustment of decedent's salary as postmaster under the provisions of the Act of March 3, 1883 (22 Stat. at L., 487), and on December 23, 1885, said salary was re-adjusted and the sum

of $2,892.84 found due decedent's estate. On August 4, 1886, a sum of money was appropriated by Congress to pay this allowance. Meanwhile, of course, interest had been running on the judgment that the United States had secured against James R. Verdier on January 25, 1871. The interest on this judgment, down to August 4, 1886, the date of the appropriation by Congress, and the costs of suit, added to the original judgment, aggregated the sum of $2,296.77. This latter sum was deducted from the amount of the re-adjusted salary, which left a balance of $596.07.

The administrator of Verdier contended that, inasmuch as under the salary adjustment of December 23, 1885, the United States owed the decedent $2,892.84, only the principal amount of the judgment should be deducted from this sum, instead of the judgment with interest, as was actually done.

This Court decided against the contention of the administrator of the Verdier estate, and, although in the course of its opinion, it did use the language quoted by the Court of Claims, it also stated as follows:

> "Nor is it strictly true to say that the Government was indebted to Verdier at the date of its judgment against him. He had performed services for which an indebtedness was subsequently *voluntarily* created by the Government, but until readjustment was made the law imposed no obligation upon the Government to pay him an increased salary. *Verdier could not have availed himself of it as a set-off or counterclaim to his own debt to the Government,* and in fact it never became a debt until the claim was liquidated under the Act of 1883." (Italics supplied.)

Furthermore, this Court, in its opinion in the *Verdier* case, makes it clear that under the Acts of Congress, which regulated the compensation of postmasters during the lifetime of Verdier, a salary re-adjustment "operated *pros-*

pectively only", and that it was not until the Act of 1883 was passed that the Postmaster General was authorized to re-adjust the compensation of postmasters so as to "make such re-adjustments *retrospective*". (Italics supplied.)

On the subject of interest upon the judgment against Verdier this Court said:

> "By U. S. Rev. Stat. Sec. 966, 'interest shall be allowed on all judgments in civil causes recovered in a Circuit or District Court in all cases where, by the law of the State in which such Court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as allowed by law on judgments recovered in the Courts of such State'. We see no reason why this Section, or Section 3624, fixing the rate of interest upon delinquent accounts of public officers at 6%, does not apply to this case. Verdier was therefore properly charged with interest upon the judgment."

During the time of service of Verdier, and, in fact, during his lifetime, the Acts of Congress which authorized, in certain cases, the re-adjustment of postmasters' salaries, were the Acts of 1864 and 1866 (Act of July 1, 1864 (13 Stat. at L. 335), and Act of July 12, 1866 (14 Stat. at L. 59 and 60)), and, as is stated in this Court's opinion in the *Verdier* case and also in the case of *United States* v. *McLean*, 95 U. S. 750, both of these Acts were *prospective* in their operation and *not retroactive*, and under each of them it was held that no re-adjustments could be made until after sworn applications had been filed with the Postmaster General, showing certain facts that under these two Acts were conditions precedent to any re-adjustment of compensation.

Verdier never made application for re-adjustment of his compensation under either of these Acts. He died prior to the passage of the Act of March 3, 1883 (22 Stat. at L.

487), which was the earliest Act authorizing retroactive re-adjutsments of postmasters' compensation, but which, like the former Acts, required sworn applications to be made setting forth certain facts which, by the terms of the Act, were made conditions precedent to the granting of any benefits thereunder. As was said by this Court in the *Verdier* case:

> "By the Act of 1883 no re-adjustment could be made except upon the application of the postmaster, and when that application was made in this case, the salary was, for the first time, re-adjusted. Until this time the debt was not liquidated * * * in fact, it would be more accurate to say that it did not exist."

In the case at bar no judgment was ever entered against the American Propeller and Manufacturing Company for the amount of the deficiency tax, as found by the Court of Claims, but, on the contrary, the American Propeller and Manufacturing Company was entitled to avail itself, as a set-off or counterclaim against the correct amount of the tax, such portion of its claim against the Government as was sufficient to wipe out the tax. The correct amount of the tax was $82,701.29, as found by the Court of Claims, and the correct amount of the Government's indebtedness was $119,413.04, as found by the Court of Claims in the same suit, to have been due and owing since the end of 1918. Both amounts being due, as of the same year, and the difference between the two amounts being a balance of $36,711.75 in favor of the American Propeller and Manufacturing Company, it follows that there never was a time when the American Propeller and Manufacturing Company was actually indebted to the United States. This was not the situation in the *Verdier* case. The American Propeller and Manufacturing Company *is not asking for interest on this balance of $36,711.75 that has been due it by the United*

States ever since the year 1918, but only asks that the amount representing this indebtedness of the United States to it be paid, *without interest.* This request violates no statutes of the United States or policy of the United States in the matter of the payment of claims due by it to its citizens. On the contrary, the failure to make such payment would seem to violate every principle of fair dealing and justice. Federal statutes make ample provision for the crediting of overpayment of taxes against a deficiency assessment. Here, instead of there being an overpayment of taxes by the American Propeller and Manufacturing Company, to be credited against a deficiency assessment, there is a finding by the Court of Claims of an actual indebtedness by the United States to the American Propeller and Manufacturing Company of $119,413.04 as of 1918, representing money spent by the American Propeller and Manufacturing Company for the use and benefit of the United States in the prosecution of the World War. Moreover, as of 1918, the American Propeller and Manufacturing Company owed the United States *only* $82,701.29 (the matter of interest not arising or being involved until 1924), and as an off-set to this indebtedness there was then, in 1918, due the American Propeller and Manufacturing Company by the United States $119,413.04, leaving a net indebtedness of $36,711.75 due the American Propeller and Manufacturing Company by the United States, thus completely wiping out the claim of the United States. In 1924 there was no indebtedness due by the American Propeller and Manufacturing Company to the United States to which interest could properly attach or be added.

The United States Statute relating to the addition of interest upon an assessment for taxes from the date of the assessment should be given a fair and reasonable interpretation, and not one that brings about a manifest injustice

and wrong. It was designed to produce the prompt payment of taxes admittedly due by imposing a penalty upon those wrongfully withholding payment.

The petitioner is here being penalized, not because of any wrong-doing or negligence on its part, but because of error and wrong on the part of the United States Government representatives. Payment of a just claim of the petitioner, in the amount of $119,413.04, as finally determined by the Court of Claims, has not only been withheld and refused by the United States since 1918, but after improperly and unjustly withholding such payment for a period of six years, the Government then, in 1924, for the first time asserted a tax claim for the year 1918 against the petitioner for the very large and erroneous amount of $191,403.77.

The Court of Claims finally, after a lapse of many years, found this belated claim to be erroneous and unwarranted to the extent of $108,711.75.

The erroneous contentions of the Governmnet not only resulted in withholding from the petitioner $119,413.04 which should have been paid the petitioner in 1918, but compelled the petitioner to resist the improper and excessive demand of the Government for taxes. Moreover, the improper withholding by the Government from the petitioner during all of these years of the large sum of money justly due the petitioner, made it impossible for the petitioner to pay, in the first instance, the unjust and excessive demand of the Government for taxes, or any part thereof, or even the part afterwards found to be due, and then seek to recover back the amount that might be held thereafter to have been improperly collected.

The petitioner, therefore, resorted to the only course open to it, namely, its suit in the Court of Claims. In this suit the Government filed as a counterclaim the erroneous and excessive assessment of additional income taxes for the

year 1918 in the amount of $191,403.77. The case then proceeded in regular course and the Court of Claims found that there was justly due the petitioner, by the United States, as of the end of the year 1918, $119,413.04, and that as of the same date the petitioner owed the Government, for additional taxes for the year 1918, $82,701.29, a difference in favor of the petitioner of $36,711.75.

As of that date, therefore, namely, 1918, no question of interest was involved, and as the amount found to be due the petitioner by the Government was in excess of the amount found to be due the Government by the petitioner, and as these findings were by the same Court, at one and the same time, in one and the same suit, the petitioner should, in equity, fairness and justice, be entitled to a judgment for the excess, to wit, $36,711.75.

Under the judgment of the Court of Claims complained of, the United States, by improperly withholding from the petitioner, for eighteen years, what was justly due it, and at the same time asserting an unjust and excessive claim for additional taxes, has succeeded not only in liquidating its own debt of $36,711.75 by no payment whatsoever thereon, but has made the petitioner its debtor in the amount of $21,895.89.

Under the authority of the language used by this Court in the *Verdier* case, and above quoted, it would appear to be established that if the Government had brought suit against the American Propeller and Manufacturing Company for $191,403.77, the amount of the additional income tax for 1918 assessed against it, the American Propeller and Manufacturing Company could have availed itself of its claim against the Government as a set-off or counterclaim. Here the situation is merely reversed. In the suit of the American Propeller and Manufacturing Company against the United States, the United States set up its tax

claim against the American Propeller and Manufacturing Company as a set-off or counterclaim, so here again the case at bar differs most materially from the *Verdier* case.

We are asking this Court to apply to the present case the principles it applied in the case of *District of Columbia* v. *Johnson*, 165 U. S. 330. There the District of Columbia, appellant, was endeavoring to off-set against the claim of the claimant, the appellee, interest for a number of years on a counterclaim that had been found by the Referee in favor of the District of Columbia, but which counterclaim was wiped out by the Act of Congress of February 13, 1895 (28 Stat. at L. 664), as found by this Court. The Court of Claims had adopted the contention of the District of Columbia. This Court, in passing upon the matter, said as follows:

> "The claim of the Appellant to off-set against any recovery here the amount of the interest from June 1, 1874, on its counterclaim found due in its favor against the claimants, in the report of the referee, we think cannot be admitted. The effect of the passage of the Act of 1895 is, in substance, the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

So in the case at bar the Court of Claims found that although as of 1918 the American Propeller and Manufacturing Company owed the United States $82,701.29, the United States, as of the same date, owed the American Propeller and Manufacturing Company more than $82,701.29, to wit, $119,413.04. The effect of these findings of the Court of Claims, to use the language of this Court just quoted, is "in substance the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

The position of the American Propeller and Manufacturing Company is, moreover, much stronger than that of the appellee in the *Johnson* case, because in the *Johnson* case the wiping out of the counterclaim of the District of Columbia, by the Act of 1895, was a *mere gratuity*, as was also true in the *Verdier* case, so far as the allowance of adjusted compensation under the Act of 1883 (22 Stat. at L. 487), is concerned, whereas, here the counterclaim of the United States was wiped out and paid by an actual credit on an actual indebtedness of the United States to the petitioner, and, in addition, the petitioner was never, at any time, actually indebted to the United States upon a proper statement of the account between them, and hence there was never any indebtedness of the petitioner to which interest could properly attach.

It is respectfully submitted, therefore, that the Court of Claims erred in not entering a judgment in favor of the American Propeller and Manufacturing Company in the amount of $36,711.75, instead of a judgment against the American Propeller and Manufacturing Company in the amount of $21,895.89, and that the writ of certiorari prayed for should accordingly issue.

Respectfully submitted,

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